A

Public Prosecutor v Abdul Kadar Kadam Ali & Ors

B HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–68 OF 2003
NALLINI PATHMANATHAN JC
1 JULY 2008

C *Criminal Law — Common intention — Murder — Whether elements of acting in concert or pre-planning to act together established — Penal Code s 34*

D *Criminal Law — Murder — Ingredients of — Evaluation of — Deceased had a pre-existing condition whereby ninety per cent of his coronary vessels were occluded — Whether evidence showed accused persons caused death of deceased — Penal Code ss 302 & 325*

E *Criminal Procedure — Prosecution — Prima facie case — Duty of trial judge at close of prosecution's case — Whether to subject prosecution evidence to maximum evaluation — Whether burden on prosecution to prove its case beyond reasonable doubts at close of its case established*

F *Evidence — Circumstantial evidence — Murder — No ocular or eyewitness evidence to establish how deceased died — Whether circumstances evidence point unerringly that act of accused persons caused death — Whether circumstantial evidence corroborated*

G

The three accused persons were originally charged together with one Mohd Izlan bin Johari under s 302 read together with s 34 of the Penal Code of causing the death of an unknown male, who was later identified as Mohd Rahanuddin, a citizen of Bangladesh. Some weeks before the commencement
H of trial, the court was informed that Izlan had died while in remand in prison. There was no ocular or eyewitness evidence to establish how the unknown man died. The prosecution's case was that there was sufficient circumstantial evidence to enable the court to conclude that the death of the unknown man was caused by the act of the accused persons and Izlan. The core evidence
I directly linking the three accused persons is that of SP-12. The salient parts of SP-12's evidence establish, inter alia, that the three accused persons were present at Izlan's flat on the night the unknown man died; the three accused persons and Izlan went into the storeroom after about 4am in the early morning hours of 14 July 2002; prior to doing so, they took in with them a

hammer and Izlan was seen taking off his belt; they shut the door of the storeroom and SP-12 was not allowed to enter the room; SP-12 heard the shouts and cries of a male voice saying 'Sakit', 'Sakit'; the four men only emerged from the room after the cries had ceased and that the three accused persons announced to Izlan the following day that 'Raihan is dead'. The post-mortem report and the findings by SP-8, the forensic pathologist, reveled that the victim had died when his heart ceased to function due to the coronary occlusion which in turn had been caused or aggravated by multiple blunt trauma. The deceased had a pre-existing condition whereby 90% of his coronary vessels were occluded.

Held, sentencing the accused persons to six and half years imprisonment:

(1) There was sufficient circumstantial evidence to enable the court to conclude that the death of the deceased was caused by the act of the accused persons and Izlan. In the context of the evidence of SP-12, her testimony was credible. The fact that no other witnesses were called to corroborate her testimony on the events of the night as they happened did not reduce the quality and value of her evidence. The substance of her evidence together with other evidence, when considered in totality, the clear and legitimate inference that arose was that the deceased died as a consequence of the act of the three accused persons and Izlan or any one or more of them (see paras 45–50).

(2) As there existed a common intention between the three accused persons and Izlan, it mattered not whether only one of them or all of them took turns to injure the unfortunate Raihan. The fact that they were all present during the infliction of the blows and did not try to stop such an attack nor to report such an attack all point to a common intention to cause injury. As such each one of them was equally liable as if he had inflicted blows on the victim. (see para 60).

(3) There was no evidence adduced by the prosecution to the effect that the accused persons or Izlan were aware of the victim's pre-existing heart condition. The totality of the evidence put forward by the prosecution established instead a common intention to cause grievous bodily injury, not murder (see para 63).

[Bahasa Malaysia summary

Tiga orang tertuduh pada asalnya didakwa bersama dengan seorang yang bernama Mohd Izlan bin Johari di bawah s 302 yang dibaca bersama dengan s 34 Kanun Keseksaan iaitu menyebabkan kematian seorang lelaki yang tidak dikenali, yang kemudiannya telah dikenalpasti sebagai Mohd Rahanuddin, seorang warganegara Bangladesh. Beberapa minggu sebelum bermulanya

perbicaraan, mahkamah telah diberitahu bahawa Izlan telah mati dalam penjara ketika direman. Tidak terdapatnya keterangan saksi untuk membuktikan bagaimana lelaki yang tidak dikenali tersebut mati. Kes pendakwaan adalah, terdapat keterangan berdasarkan keadaan yang mencukupi bagi membolehkan mahkamah untuk menyimpulkan bahawa kematian lelaki yang tidak dikenali tersebut adalah disebabkan oleh perlakuan tertuduh-tertuduh dan Izlan. Teras keterangan yang bersambung secara terus kepada ketiga-tiga tertuduh adalah SP-12. Bahagian yang penting daripada keterangan SP-12 yang membuktikan, antara lain, bahawa ketiga-tiga tertuduh hadir di pangsapuri Izlan pada malam kematian lelaki yang tidak dikenali tersebut, ketiga-tiga tertuduh dan Izlan telah masuk ke dalam bilik stor kira-kira 4 pagi 14 Julai 2002, sebelum itu, mereka membawa bersama-sama penukul dan Izlan telah dilihat membuka tali pinggangnya, mereka telah menutup pintu bilik stor dan SP-12 tidak dibenarkan masuk bilik tersebut; SP-12 mendengar suara lelaki menjerit dan berteriak 'Sakit', 'Sakit'; keempat-empat lelaki hanya muncul daripada bilik tersebut selepas jeritan hilang dan ketiga-tiga tertuduh memberitahu kepada Izlan pada hari berikutnya bahawa 'Raihan telah mati'. Laporan bedah siasat dan keputusan oleh SP-8, seorang ahli forensik patalogi, mendedahkan bahawa mangsa telah mati apabila jantungnya berhenti berfungsi akibat daripada penyumbatan koronari yang disebabkan atau diburukkan lagi oleh beberapa pukulan senjata tumpul. Si mati mempunyai keadaan asal yang mana 90% saluran koronarinya adalah tersumbat.

Diputuskan, menghukum tertuduh-tertuduh dengan hukuman penjara enam tahun setengah:

(1) Terdapat keterangan berdasarkan keadaan yang mencukupi bagi membolehkan mahkamah menyimpulkan bahawa kematian si mati adalah disebabkan oleh perlakuan tertuduh-tertuduh dan Izlan. Dalam konteks keterangan SP-12, testimoninya adalah boleh dipercayai. Fakta bahawa tiada saksi lain dipanggil untuk menyokong testimoninya berkenaan dengan malan kejadian berlaku, tidak mengurangkan kualiti dan nilai keterangannya. Isi keterangannya bersama dengan keterangan yang lain, apabila dipertimbangkan secara keseluruhan, jelas dan inferens yang sah yang timbul bahawa si mati mati disebabkan oleh perlakuan ketiga-tiga tertuduh dan Izlan atau salah seorang atau lebih daripada mereka (lihat perenggan 45–50).

(2) Oleh kerana wujud niat bersama di antara ketiga-tiga tertuduh dan Izlan, ia bukannya sama ada hanya seorang daripada mereka atau kesemuanya mengambil giliran untuk mencederakan Raihan. Fakta bahawa mereka kesemuanya hadir semasa pukulan berlaku dan tidak cuba untuk memberhentikan serangan tersebut atau melaporkan

serangan tersebut kesemuanya adalah niat bersama untuk menyebabkan kecederaan. Oleh yang demikian setiap seorang daripada mereka adalah bertanggungan bersama jika tertuduh yang menyebabkan pukulan terhadap mangsa (lihat perenggan 60).

(3) Tidak terdapat keterangan yang dikemukakan oleh pendakwaan berkenaan dengan tertuduh-tertuduh dan Izlan adalah mengetahui keadaan jantung mangsa. Keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan telah membuktikan niat bersama untuk menyebabkan kecederaan teruk pada badan dan bukannya pembunuhan (lihat perenggan 63).]

Notes

For a case on circumstantial evidence in murder, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 632–633.

For cases on common intention generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 53–55.

For cases on murder generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1154–1167.

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2945–2957.

Cases referred to

Aziz Muhamad Din v PP [1996] 5 MLJ 473 (refd)
Balachandran v PP [2005] 2 MLJ 301 (refd)
Gurdatta Mai AIR 1965 SC 257 (refd)
Gurnam Singh v State of Punjab 1988 Cri LJ 4024 (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Naseem Ahmed v Delhi Administration AIR 1974 SC 691 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
Putti Lai v State 1969 Cri LJ 531 (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37 (refd)

Legislation referred to

Criminal Procedure Code s 180
Evidence Act 1950 s 134
Penal Code ss 34, 299, 300, 302, 325
Penal Code [India] s 304, Part II

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Nallini Pathmanathan JC:

INTRODUCTION

[1] The three accused persons, Abdul Kadar Kadam Ali ('first accused'), Odud Hossain Late Mozahar ('second accused') and Md Saiful Noor Husain (third accused) who are all citizens of Bangladesh were originally charged together with one Mohd Izlan bin Johari (NRIC No 781228-14-6183) ('Izlan') of causing the death of an unknown male who was a citizen of Bangladesh under s 302 read together with s 34 of the Penal Code.

[2] Tragically, some weeks before the commencement of trial, the court was informed that Izlan had died while in remand in prison. As such, at the commencement of trial, the charge was amended to read as follows:

> That you together with a person who has died (Mohd Izlan bin Johari No KP: 781228-14-6183) on 13 July 2002 between the hours of approximately 10pm until 3.30pm, on 14 July 2002 in house No AK 3-19, Jalan Pandan Indah 3/3, Pandan Indah, Ampang in the district of Hulu Langat, in the state of Selangor Darul Ehsan did commit the offence of murder namely by causing the death of an unknown male who was a citizen of Bangladesh and you have thereby committed an offence that is punishable under s 302 of the Penal Code read together with s 34 of the Penal Code.

THE FACTS OF THE PROSECUTION CASE

[3] In July 2002, the deceased Izlan, who was originally charged with the three accused persons, resided with his wife, one Juwita bt Pakaruddin ('SP-9') in a rented flat in Pandan Indah, Kuala Lumpur. The address of the flat was No AK 3-19, Jalan Pandan Indah 3/3, Pandan Indah, Ampang. It contained three rooms. Izlan and SP-9 had lived there from the time they were married. After their marriage, they shared the flat with a friend named 'Shah'. They also had one child. This accounted for the use of two of the three rooms. The third room was not inhabited by anyone and was used as a store. SP-9 testified that in 2002 her husband, Izlan, was unemployed. At that time she worked as a cashier at the Beach Club Cafe in Jalan P Ramlee, Kuala Lumpur. She wore, as part of the uniform, a blue sleeveless T-shirt bearing the name 'Beach Club Cafe'. She possessed more than one such T-shirt.

[4] On 13 July 2002 Izlan took SP-9 and their child to her mother's house at about 4pm to celebrate SP-9's sister's birthday. After dropping them off, Izlan waited for a short while before leaving. SP-9 stayed at her mother's home from that day until 16 or 17 July 2002. On one of those dates, the child suffered an attack of asthma and SP-9 contacted Izlan to take her and

the child to the hospital for treatment. During the period between 13 July and 17 July, SP-9 said that Izlan only visited her mother's home for a few minutes.

[5] Returning to the events of the evening of 13 July 2002, it becomes necessary to consider the evidence of Noor Adzlydawanni bt Ibrahim ('SP-12'). She described herself as Izlan's girlfriend at the time in July 2002. She testified that she had been to Izlan's rented flat in Pandan Indah and identified the flat in photographs that were shown to her (exhs P13(5), (6), (7) and (8). She confirmed that on 13 July 2002 she had met up with Izlan. He had fetched her from her home, a rented flat in a shophouse also in Pandan Indah. After that he picked up three of his friends and left these friends at his home, the rented apartment in Pandan Indah bearing the address No AK 3-19, Jalan Pandan Indah 3/3, Pandan Indah, Ampang. SP-12 unhesitatingly identified the three accused persons as Izlan's three friends who were left at Izlan's flat on 13 July 2002. She knew them simply as 'Darul', 'Jamal' and 'Hussain'.

[6] After dropping the three accused persons in his flat, Izlan and SP-12 went out for a meal. After their meal, Izlan dropped SP-12 back at her home telling her that he had to take one other person to his home, namely someone called Raihan. SP-12 did not see or meet the said Raihan. After all these four persons had been taken to Izlan's flat, Izlan picked SP-12 up once more and they went out. They stayed out until 4am the following morning, ie 14 July 2002.

[7] When they returned to Izlan's flat, the three accused persons were sleeping in the hall. SP-12 testified that the fourth person, Raihan was locked in the store at the back of the apartment. However at no time was she allowed to enter the storeroom, so she did not actually see Raihan in there. SP-12 then saw Izlan taking off his belt. Then he and the three accused men entered the storeroom at the back of the flat. She also noted that they took in a hammer. The door to the storeroom was shut. SP-12 went into one of the other rooms in the flat. Next she heard the sounds of a voice shouting and screaming, 'Sakit! Sakit!' At this point, SP-12 opened the door of the room she was in, and listened to the screams and shouts of the person emanating from the storeroom. She identified the voice as a male voice. According to SP-12, after the shouts had ceased, Izlan and the three accused persons came out of the room. She asked Izlan what tools they had used to beat the male person in the storeroom.

[8] After this, the three accused men went back to sleep in the hall while she and Izlan slept in the room. When they got up on 14 July 2002, SP-12 and Izlan went out to buy some food. The three accused persons remained in

Izlan's flat. When they returned, SP-12 stated that she heard the three accused persons informing Izlan that 'Raihan' was dead. According to SP-12, Izlan would not let her go into the storeroom so she never saw Raihan. Upon hearing the news that 'Raihan' was dead, SP-12 became frightened and told Izlan to take her home. However he did not immediately do so. He took one of the three accused persons and her in his car to Klang Lama. SP-12 could not recall which of the three persons accompanied them. They went to a house where Izlan collected RM50. After that Izlan went to an electrical shop. He and one of the three accused persons then went into the shop while SP-12 remained in the vehicle. When they returned, SP-12 saw that Izlan was carrying a large box. The box was folded and put away in the boot of the car. After this Izlan took SP-12 home and left her there.

[9] On 14 July 2002 at about 7.30pm, one Wong Fat ('SP-5') was in his house at No 19, Jalan Bukit Permai 2/4, Taman Bukit Permai 2, Kuala Lumpur. SP-5 was familiar with Jalan 2/4 as it was next to his house towards the back. He routinely used the said road. It had no street lamps. On that evening he noticed a black or dark blue car driving up to the area near the front of his house. This area in front of his house was a large vacant space and at its edge was a fence which precluded the further passage of the vehicle up the hill.

[10] The car was driven up to the fence, and the driver then realising that it could go no further, retreated back down Jalan Bukit Permai 2/4. When the vehicle had gone past, SP-5 went into his house. He heard the vehicle stopping along the road. Then he heard the sound of a box being dragged across the ground. He came out of his house and watched the road from the fence of his property. He saw that a box was left on the lane between Jalan Bukit Permai 2/3 and 2/4. The vehicle then left the area. SP-5 could not recall the registration number of the vehicle. SP-5 recalled that there were at least two, and possibly three persons in the vehicle. He assumed then that rubbish was being deposited there, and did not bother to go and inspect the box.

[11] In the early hours of the morning of 17 July 2002, Izlan's wife, SP-9, called Izlan from her mother's house insisting that he come immediately to take their child who was suffering from asthma for treatment to the hospital. Izlan arrived at around eight in the morning. They stopped briefly at their rented flat so that she could collect the child's birth certificate, which was required to procure treatment at the hospital. She then hurried off to the hospital and after treatment, returned to her mother's house in Pandan Dalam, Ampang. She only returned to their flat in Pandan Indah later that night. At this point SP-9 noticed that the curtains which had been hanging in each corner of the flat were missing. SP-9 did not notice that any other

items were missing. She did not enter any of the rooms except her own. She went on to testify that Izlan and she were arrested later on that night from her mother's house.

[12] Reverting back to the abandoned box deposited between Jalan Bukit Permai 2/3 and 2/4, it was noticed about three days later, on 17 July 2002, that a terrible odour was emanating from the box. SP-5's wife noticed this stench when she was cooking and suspected that it might have something to do with the large abandoned box. SP-5 decided to enlist the help of his neighbour to investigate the contents of the box. At about 6pm on 14 July 2002, SP-5 spoke to his neighbour, Mohd Aris bin Khamis ('SP-6') about the box. SP-6 immediately went to investigate its contents. He noticed a terrible odour as he neared the box. The dimensions of the box were, according to SP-6, about three or four feet in length, breadth and height. SP-6 tried to open the box using a 'cangkul' and a pair of scissors. When a small portion of the box was opened at the top, he saw the leg of a human being. He immediately called the police using his handphone.

[13] The police responded quickly and were present at the scene within about five minutes. One Lance Corporal Mohd Isa and Constable Mohd Farhan who responded to the call informed the duty personnel at the Emergency Operations Room at the Ampang Jaya police station that a corpse had been found in the box. The corpse appeared to be wrapped in cloth. The relevant personnel on duty were informed, as was one Amidon bin Anan ('SP-11) who was then the Head of Crime Scene Investigation at the Forensic Laboratory, Cheras. In his position he was responsible for the analysis of crime scenes and the identification and collection of relevant exhibits for use in the investigation process.

[14] SP-11 arrived at the site where the corpse was found in a box at about 7pm on 17 July 2002. He headed a team of four persons. He noted the box was torn and that there were water stains and blood dripping from the box. It contained a human corpse which was highly decomposed and which emitted a strong stench. Maggots were evident on the corpse. The body appeared to be covered in curtains. Significantly there were several items found in the box together with the corpse. Amongst these items were a blue, sleeveless T-shirt with the words Beach Club Cafe' on it. The T-shirt was blood stained. Apart from several plastic bags, SP-11 also found a school leaving certificate bearing the serial number 0724 and the name 'Juwita bt Pakaruddin' which is SP-9's name. There was also a 'Good Morning' towel and a blue sponge found in the box. SP-11 collected no less than nine exhibits from the box, including pieces of the box. He tried to procure fingerprints from the box and the plastic bags but failed to detect any prints.

SP-11 surrendered the exhibits to an investigating officer, Chief Inspector Norazman two hours after arriving at the scene.

[15] On the same night at about 11pm one Chief Inspector Omar bin Hassan ('SP-7') headed a team of policemen who went to Blok F3/15 Jalan Hilir Tujuh, Taman Sri Angsana Hilir, Kg Pandan Dalam, Ampang to make an arrest. This was the home of SP-9's mother. Prior to this SP-7 had visited the scene where the corpse was found in the box. Within fifteen minutes both SP-9 and Izlan were arrested to assist in further investigations undertaken in relation to the body that had been found along Jalan Bukit Permai 2/3. SP-7 also seized a black motorvehicle, a Kancil carrying registration No WGH 9746.

[16] On 18 July 2002, at about 3.30am, SP-7 and his team together with Izlan went to the front of the Hicks Mansion in Jalan Hicks and carried out surveillance. After about 15 minutes, Izlan pointed out a male.

[17] After introducing themselves as policemen, SP-7 and his team arrested the man who was Abdul Kadar Kadam Ali, the first accused. At 4am on the same morning, again guided by the first accused, the police headed to House No 17C Jalan Sahabat, Off Jalan Hicks Kuala Lumpur and arrested Odud Hossain Late Mozahar, the second accused. The third accused was arrested several days later, on 23 July 2002, at a house at No 18, Jalan 5.2 Bandar Puchong, Selangor having been directed there by Izlan. The third accused was found hiding in the water tank.

[18] On the morning of 18 July 2002 the forensic team referred to earlier that had conducted an investigation at the site where the corpse had been found, carried out a further investigation at Izlan's flat at AK 3-19, Blok AK, Jalan Pandan Indah. The team was headed by SP-11. The flat was surrendered to the team which searched each room of the apartment respectively. SP-11 and his team found blood stains on the wall of the storeroom which he duly marked and which was photographed. The three blood stains were small but evident. They also found a plastic wrapper for 'Quality Multi-Purpose Nylon Ropes' in a tyre in the storeroom and various other items. Of significance was a blue T-shirt in the cupboard in one of the rooms which was similar to the blood stained sleeveless T-shirt found next to the corpse.

THE POST-MORTEM AND THE FINDINGS OF THE FORENSIC PATHOLOGIST

[19] The forensic pathologist who conducted the post-mortem on the human corpse found in the box was Dr Faridah Mohd Nor ('SP-8'). On 17 July 2002 at about 10.30pm SP-8 went to inspect the body together

with a second investigating officer, one ASP Yong Koo Soon. SP-8 described what she found on first sight of the corpse as follows:

> … A box was discovered lying on the road near a house with trails of smelly fluid near the box. When it was opened, a body was found wrapped in pink flowery curtains and a towel; clad with underwear and rolled up in a curled position with both knees to the chest. He was lying face up, left lateral with both arms and legs in flexed position ... On the day of discovery, the box appeared dry, the body was partially decomposed and was covered with numerous maggots ranging from small to medium-sized maggots. There were no eggs orpuparium present …

The body itself was only clad in underwear.

[20] In her post-mortem report, exh P12, SP-8 describes all the items that were found in the box with the body. She described the curtains as comprising two pairs each of large and small white curtains with pink fringes with yellow and pink flowers and green leaves on them, which were stained with blood. She also described the box in which the body was found as being tied around with several strands of yellow nylon strings each measuring about 350cm and which were plastered over with transparent tape.

[21] The body was found to be 164cm in height, 45.2kg in weight and according to SP-8 appeared Bangladeshi in appearance. The body was partially decomposed with generalised marbling and with blackish-green discolouration in general. The skin over the tip of both feet had slipped off.

[22] There were no less than 14 marks of external injury on the body. Save for the fracture of the eighth and ninth ribs in the right chest, the rest of the injuries were largely contusions, namely injuries to the body in which skin and bone were not broken but damage was occasioned to the tissues under the skin, causing bruising. Contusions were apparent over the right parietal portion of the head, the vertex of the head, the right ear and a large contusion on the right chest, the right back extending to the middle third of the back, the lateral aspect of the right arm, the lower half of the left forearm, the middle third of the right thigh, the right upper leg, the lower 1/3 of the left thigh and a very large contusion on the right lower leg extending to the right foot and finally a large contusion on the lower 1/3 of the left lower leg extending to the ankle and foot.

[23] Internally the body had not suffered injury to the organs. However the heart demonstrated a 90% occlusion with atheroma. From this it can be gleaned that the victim had suffered from a pre-existing heart condition not brought about by trauma, well before his death. Specimens of skin, hair and other tissue samples were taken for analysis as were samples from the exhibits

found in the box with the body. Finally several specimens of maggots were sent for analysis, which placed the date of death of the victim as 14 July 2002 or earlier.

[24] SP-8 concluded that the cause of death of the victim was coronary occlusion due to coronary atheroma aggravated by multiple blunt trauma. From this it was to be understood that the victim had died when his heart ceased to function due to the coronary occlusion which in turn had been caused or aggravated by multiple blunt trauma. She testified that the multiple blunt trauma could be caused by punches, kicks, being stepped on or being beaten with blunt objects such as an umbrella or a hammer. In response to a question as to which of the 14 injuries could have caused the victim's death, SP-8 stated that all of the injuries could have caused his death. She also characterised several of the contusion injuries on the limbs as amounting to defensive injuries, namely those incurred in the course of avoiding or shielding blows. SP-8 also stated that the injuries suffered by the victim would, in the ordinary course of events be consistent with attacks by one or more individuals.

[25] The investigation of the case was undertaken by two investigating officers. On the day of discovery of the body, on 17 July 2002, one Inspector Norazman had conduct of the case. On the following day however, one Assistant Superintendent Yong Soon Koon ('SP-13') took over. The defence contended in relation to the investigation that it was cursorily and carelessly undertaken. The court was invited to conclude that the nature of the investigation was so lacking that it raised a reasonable doubt as to the prosecution's case. The primary complaints were that SP-13 could not identify the three accused persons individually and had failed to 'close' the gaps in the prosecution's case. When the investigation was considered as a whole, the court found that the forensic team had played an important role in identifying exhibits that were found to be of significance in comprising links in the chain of circumstantial evidence. Exhibits recovered by the forensic team as well as from the accused persons were sent to the Department of Chemistry but did not produce any significant results. The notable omission in the investigation was the failure to procure blood samples from the three accused men.

[26] The defence also raised the fact that although SP-13 found out the name of the 'unknown man' from the Bangladesh Embassy, his name had not been utilised in the charge. The failure to utilise the name of the 'unknown man' in the charge does not detract from the fact that the three accused persons were charged, in conjunction with Izlan, with causing his death.

BURDEN OF PROOF AT THE CLOSE OF THE PROSECUTION'S CASE

[27] As prescribed by s 180 of the Criminal Procedure Code, the duty of the court at the close of the prosecution's case is to consider whether a prima facie case has been made out against the accused. If a prima facie case has not been made out the court is bound to record an order of acquittal, while if it has been made out on the offence charged, the court is bound to call upon the accused to enter on his defence. In the instant case, the court is bound to consider whether a prima facie case has been made out against the three accused persons in respect of the charge brought against them under s 302 of the Penal Code read together with s 34.

[28] In order to ascertain whether a prima facie case has been made out against each of the three accused persons, the evidence raised in the course of the prosecution's case will have to be maximally evaluated. The duty of the court is to undertake a meticulous examination of the entirety of the evidence raised thus far. The purpose of undertaking such an evaluation is to test the credibility of the prosecution's witnesses and to ensure that all the requisite ingredients of the offence have been made out.

[29] The test to be adopted in determining whether a prima facie case has been made out has been clearly enunciated in, inter alia, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 where the Federal Court held (at pp 315–316):

> … A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by rebuttal evidence. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed), as:
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> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that if unrebutted, it is sufficient to induce the court to believe in the existence of the facts as stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be belived in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the

> prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established... The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.
>
> As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage be properly described as a case that has been proved beyond reasonable doubt …

[30] This then is the burden imposed on the prosecution in order to prove a prima facie case. In order to assess whether such burden has been discharged, it is expedient to consider first the ingredients that have to be fulfilled in order that a charge under s 302 read together with s 34 can be made out.

THE INGREDIENTS OF THE OFFENCE OF MURDER UNDER S 302 OF THE PENAL CODE

[31] Murder is comprehensively defined in the Penal Code under ss 299 and 300. The punishment for murder is set out in s 302. Section 299 provides as follows:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Section 300 states:

> Except in the cases hereinafter excepted, culpable homicide is murder if the act by which the death is caused is *done with the intention of causing death*, or secondly — If it is *done with the intention of causing such bodily injury as the offender knows to be likely to cause the death* of the person to whom the harm is caused, or thirdly — If it is *done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*, or fourthly — If the person committing the act *knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death*, or such injury as aforesaid.
>
> (Emphasis added.)

[32] In order to establish its case the prosecution therefore has to prove in the instant case involving the three accused persons and the deceased Izlan, that:

(i) the death of a human being has taken place;

(ii) that such death was caused by or in consequence of the act/s of the accused persons;

(iii) that the act was done with the common intention of Izlan and the accused:

(a) to cause the death; *or*

(b) to cause such bodily injury as they knew to be likely to cause the death; *or*

(c) to cause bodily injury which in the ordinary course of nature is sufficient to cause death, *or*

(d) with the knowledge that their acts were so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and they committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

[33] In the context of the charge as drafted, it is incumbent on the prosecution to establish that:

(i) an unknown male who was a citizen of Bangladesh died between the hours of 10pm on 13 July 2002 and 3.30pm on 14 July 2002 in house No AK 3-19, Jalan Pandan Indah 3/3, Pandan lndah;

(ii) his death was caused by or in consequence of the act of the accused persons and one Izlan, now deceased;

(iii) that the act was done with the common intention of the three accused persons and Izlan:

(a) to cause death, or

(b) to cause such bodily injury as the accused persons and Izlan knew to be likely to cause death, or

(c) to cause bodily injury which in the ordinary course of nature is sufficient to cause death, or

(d) with the knowledge that their act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and they committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

A HAS A PRIMA FACIE CASE UNDER S 300 OF THE PENAL CODE BEEN PROVED BY THE PROSECUTION?

[34] Element (a) is proved if the prosecution can establish that:

B (a) an unknown male who was a citizen of Bangladesh died between the hours of 10pm on 13 July 2002 and 3.30pm on 14 July 2002;

(b) in house No AK 3-19, Jalan Pandan Indah 3/3, Pandan Indah, ie, at Izlan's flat.

C

[35] The fact that an unknown male died between the hours of 10pm on 13 July 2002 and 3.30pm on 14 July 2002 is established by the evidence of the pathologist, SP-8 and her post-mortem report, exh P-12. In the course of her evidence she testified that she visited the site where the body was found D on 17 July 2002 and conducted a post-mortem on the body the following day. She described the victim as being male and having the appearance of a Bangladeshi. The estimated time of death was made by SP-8 herself as ranging between 13 July 2002 and 15 July 2002. The ectomological report, which was conducted on the basis of the maggots found on the body further E narrowed this interval of time to 14 July 2002. The fact that the investigating officer made inquiries of the Bangladesh High Commission and subsequently identified the dead man as Mohd Rahanuddin Late Abdus Samad bears out the fact that he was of Bangladesh origin.

F **[36]** Has it been established that this unknown male died in Izlan's flat at No AK-3, Jalan Pandan Indah 3/3? This requires a consideration of both the documentary and oral evidence adduced by the prosecution. SP-8 and the forensic expert, SP-11 both explained how the body of the victim was found wrapped in curtains. In her post-mortem report SP-8 describes in some detail G that the body was wrapped in two pairs of matching curtains, one large pair and a smaller pair, both of which were stained with blood. They had drawings of yellow and pink flowers and green leaves on them. SP-9 it will be recalled, specifically noted that the curtains hanging in Izlan's and her flat were missing when she returned home on the night of 17 July 2002. She went on to testify H on being shown the curtains in which the body was wrapped, that they were indeed her curtains which had been hanging in the flat. She confirmed in cross-examination that she was certain that the curtains shown to her in court were the ones previously hanging in the flat because her mother-in-law had given them to her. From the evidence of SP-8, SP-11 and SP-9 it may be I concluded that the curtains used to wrap the body were the curtains hanging in Izlan's flat.

[37] Next, SP-11, the head of the forensic unit in Selangor testified that on examining the box in which the body was found, he found numerous other

items. Some of the items that link/trace the unknown man's death back to Izlan's flat are the school leaving certificate bearing serial No 0724 and the name Juwita bt Pakaruddin and a blood-stained, blue sleeveless T-shirt bearing the name 'Beach Club Cafe' on its front. The school leaving certificate belonged to SP-9 who testified to this effect when shown the certificate. SP-9 also confirmed that the blue blood stained sleeveless T-shirt with the words Beach Club Cafe on its front was hers. These exhibits which were found together with the body in the box all serve to link the body to Izlan's flat. Additionally an empty plastic bag for multipurpose nylon string was found in the storeroom, while the box containing the body had been tied up with yellow nylon string.

[38] The foregoing evidence has to be considered in conjunction with SP-12's evidence and that of the other witnesses, namely that:

(a) the three accused persons and Izlan were present in Izlan's flat in the early morning hours of 14 July 2002;

(b) a male was present in the store-room in Izlan's flat;

(c) the three accused and Izlan went into the storeroom and kept the door of the room shut;

(d) SP-12 heard the cries and shouts of a male voice;

(e) the three accused persons announced to Izlan and SP-12 that 'Raihan' was dead on 14 July 2002, clearly referring to the person in the store-room;

(f) SP-12 witnessed Izlan and one of the three accused procuring an empty box from a shop on 14 July 2002;

(g) SP-5 witnessed either two or three men from a black car depositing a box at Jalan Bukit Permai 2/3;

(h) that box was found to contain the body of an unknown Bangladeshi man in a highly decomposed state;

(i) the box had been tied with nylon string or rope which in turn had been plastered down;

(j) the ectomological study of the maggots found on the body of the Bangladeshi man showed that he had died on 14 July 2002; and

(k) SP-13, the investigating officer who made enquiries at the Bangladesh High Commission was informed on 3 July 2002 that the unknown man was one Mohd Rahanuddin Late Abdus Samad.

[39] These composite facts when considered together warrant the conclusion that the unknown man of Bangladeshi origin died in Izlan's flat on

14 July 2002. This is because the oral evidence of SP-12 establishes that a man called Raihan who was in the storeroom of Izlan's flat died on or by 14 July 2002. The fact that the body of the unknown man was found wrapped in the curtains from Izlan's flat together with his then wife's school leaving certificate and blood-stained work T-shirt in a box which was placed along a road in Jalan Bukit Permai, merits the conclusion that after his death in the storeroom, the unknown man was wrapped in the curtains from Izlan's flat and placed in a box, which in turn was left along Jalan Bukit Permai 2/3, Pandan Indah.

THE EVIDENCE OF SP-12

[40] The crux of the matters in issue in this case are premised on the testimony of SP-12. Her evidence was clear and direct. In cross-examination she agreed that she had never seen 'Raihan' and did not know him. She also concurred that she did not know who was confined in the storeroom at the back of Izlan's house. However she was able to positively identify the three accused persons and remembered how each of them was called. SP-12's evidence as to the events of the early morning hours of 14 July 2002 and later on in the day, was not, challenged by the defence. Her demeanour was confident and she exhibited no nervousness throughout her testimony. There was no reason to doubt the veracity of her evidence on these events.

[41] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 (HC) Augustine Paul J (as His Lordship then was) set out the test for determining the credibility of a witness (at p 79):

> The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bohjraj v Sitaram* AIR 1936 PC 60). It must, however, be observed that being unshaken in cross-examination is not per se an all sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration (see *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257)...

[42] In the instant case apart from the fact that SP-12's evidence was not challenged on her narrative as to the events which took place on the said dates, it does not appear to be inherently improbable.

[43] In giving weight to SP-12's evidence the court was conscious of the fact that her evidence was the primary link between the three accused persons and the death of the unknown man. I therefore reminded myself of the need to exercise considerable caution in the consideration of her evidence. The fact

that it was not challenged in substance contributed to my conclusion that she was a witness of truth. In this context, s 134 of the Evidence Act 1950 specifically provides that:

> No particular number of witnesses shall in any case be required for the proof of any fact

In *Aziz Muhamad Din v Public Prosecutor* [1996] 5 MLJ 473 at p 484 Augustine Paul JC (as His Lordship then was) explained that:

> The section enshrines the well recognized maxim that 'evidence has to be weighed and not counted'. On the need for corroborative evidence for the proof of any fact Sinha J said in *Vadivelu Thevar v State of Madras* [1957] SC 614 in the following terse terms at pp 618–619:
>
> On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established
>
> (1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character;
>
> (2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character; and
>
> (3) Whether corroboration of the testimony of a single witness is or is not necessary must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

[44] In the context of the evidence of SP-12, I was satisfied that her testimony was credible. The fact that no other witnesses were called to corroborate her testimony on the events of the night as they happened does not reduce the quality and value of her evidence. The substance of her evidence comprised the core cord on the basis of which the other strands of circumstantial evidence could be bound and utilised, thus allowing a cumulative picture to emerge, as is considered below.

Elements (ii) and (iii):

Was the death of the unknown man caused by or in consequence of the act of the accused persons and Izlan?

Was the act done with the common intention of the three accused persons and Izlan to cause death?

[45] There is no ocular or eyewitness evidence to establish how the unknown man died. The prosecution's case is that there is sufficient circumstantial evidence to enable the court to conclude that the death of the unknown man was caused by the act of the accused persons and Izlan. *Ratanlal and Dhirajlal's Law of Crimes* (5th Ed), Vol 2 sets out the law on circumstantial evidence thus:

> ... In a case where there is a plethora of circumstances which are plenty and overlapping and are so twined so as to form a stout cord which rope in the accused in such a way that the escape from the conclusion of their guilt becomes difficult, nay, impossible, the conviction may be based on circumstantial evidence … For a crime to be proved, it is not necessary that the crime must be seen to have been committed and must in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed...

[46] However it is equally clear that no conviction of guilt can be made unless the circumstances and evidence point unerringly to the guilt of the accused person. In other words, the circumstances should be such that no other conclusion can be reached save that of the guilt of the accused. In considering the circumstances it is the cumulative effect of the chain of continuing circumstances that must be taken into account. In *Naseem Ahmed v Delhi Administration* AIR 1974 SC 691, Chandrachud J put it thus:

> ... For determining whether the circumstances established on the evidence raise but one inference consistent with the guilt of the accused, regard must be had to the totality of the circumstances. Individual circumstances considered in isolation and divorced from the context of the overall picture emerging from a consideration of the diverse circumstances and their conjoint effect may by themselves appear innocuous. It is only when the various circumstances are considered conjointly that it becomes possible to understand and appreciate their true effect. If a person is seen running away on the heels of a murder, the explanation that he was fleeing in panic is apparently not irrational. Blood stains on the clothes can be attributed plausibly to a bleeding nose. Even the possession of a weapon like a knife can be explained by citing a variety of acceptable answers. But such circumstances cannot be considered in water tight compartments. If a person is found running away from the scene of murder with blood-stained clothes and a knife in his hand, it

would in a proper context be consistent with the rule of circumstantial evidence to hold that he had committed the murder. A

[47] It therefore falls to be considered whether on the totality of the evidence raised the compelling inference that is to be drawn is that the three accused persons and Izlan caused the death of the unknown man. The core evidence directly linking the three accused persons to the death of the unknown man is that of SP-12. Although inferences have been drawn from her evidence to establish the fact of the death of the unknown man in Izlan's flat, the same evidence is also relied upon to establish the fact that the three accused persons and Izlan caused the death of the unknown man. The salient parts of her evidence establish that: B C

(a) the three accused persons were present at Man's flat on the night the unknown man died;

(b) there was a person who was forcibly kept in the storeroom of Izlan's flat; D

(c) the three accused persons and Izlan went into the storeroom after about 4am in the early morning hours of 14 July 2002;

(d) prior to doing so, they took in with them a hammer. Izlan was seen taking off his belt; E

(e) they shut the door of the storeroom and SP-12 was not allowed to enter the room;

(f) SP-12 heard the shouts and cries of a male voice saying 'Sakit', 'Sakit'; F

(g) the four men only emerged from the room after the cries had ceased;

(h) SP-12 asked Izlan what implements he had used to hit the man;

(i) the three accused persons announced to Izlan the following day that 'Raihan is dead'. G

[48] This is what SP-12 said in her evidence:

Q: Pada 13-7-02 ada kamu jumpa dengan Izlan di rumahnya? H

A: Ya.

Q: Kenapa?

A: Dia ambil saya ke rumahnya pada tarikh tersebut. Selepas itu dia ambil saya pergi ambil tiga orang rakannya. Selepas itu menghantar mereka ke rumah Izlan dan tinggal mereka di situ. Selepas itu Izlan bawa saya pergi makan. Habis makan dia hantar saya balik ke rumah saya dan dia memberitahu saya untuk ambil Raihan (si mati) pergi ke rumah dia. I

Q: Boleh cam tiga rakannya?

A: Boleh. Mereka tiga orang di kandang

Q: Tahu nama mereka?

A: Nama mereka, Hussain, Jamal, Darul. Saya tak ingat hanya nama.

Q: Bagaimana tahu nama mereka?

A: Izlan panggil macam itu.

Q: Tadi ada sebut nama 'Raihan'. Ada nampak dia di rumah Izlan?

A: Tidak

Q: Macam mana kamu tahu nama Raihan?

A: Izlan beritahu saya.

Q: Pernah jumpa Raihan?

A: Tak pernah.

Q: Pada hari kejadian 13-7-02 kamu dan Izlan ke mana?

A: Pada 13-7-02 selepas keempat-empat orang di rumahnya, tinggalkan empat orang di rumah dan keluar bersama saya.

Q: Ada kamu kembali ke rumah malam itu?

A: Ya, pukul 4 pagi.

Q: Bila kembali apa berlaku?

A: Raihan dikurung di bilik belakang. Yang lagi tiga orang ini tidur di ruang tamu. Saya duduk di dalam bilik. Saya nampak Izlan dan tiga orang ini masuk ke bilik belakang. Saya terus masuk ke dalam bilik lain. Bilik belakang itu macam bilik stor. Dan saya terdengar bunyi orang menjerit sambil cakap 'Sakit! Sakit!' Selepas itu saya buka pintu dan dengar jeritan orang itu. Saya nampak Man buka tali pinggang dan masuk ke bilik belakang. Kemudian saya tanya kepada Man 'kamu pukul dengan benda apa?' Selepas jeritan habis, dia orang keluar dari bilik itu.

Q: Bila rujuk kepada 'dia orang' bermakna siapa?

A: Man, Darul, Jamal dan Hussain.

Q: Bila merujuk kepada jeritan, suara siapa?

A: Suara lelaki

Q: Adakah kamu sendiri masuk ke bilik belakang?

A: Saya tak masuk.

Q: Apa berlaku selepas itu?

A: Selepas pukulan habis, mereka semua, Darul, Jamal dan Hussain masuk dan tidur di ruang tamu rumah itu.

Q: Pada waktu itu bagaimana keadaan pintu bilik belakang?

A: Sentiasa tutup.

Q: Seterusnya apa berlaku?

A: Darul, Hussain dan Jamal beritahu Man, Raihan dah mati.

Q: Ada kamu melihat Raihan?

A: Man tak beri saya tengok.

[49] From these facts the clear inference that is to be drawn is that the male who was locked in the store-room in Man's flat and known to the four men as 'Raihan', was beaten by any one or more of the four men, namely the three accused persons and Izlan in the early hours of the morning of 14 July 2002. As a consequence of this seating the said 'Raihan' died. The statement that Raihan had died was made by the three accused persons the following day. Although the statement in itself does not prove that the said 'Raihan' had died that night, when it is considered in conjunction with the earlier events of the night and the subsequent conduct of Izlan and the accused persons in placing the body of a man in a box and leaving him far away from Man's flat, it may be legitimately inferred that the unknown man known as 'Raihan' died that night in Man's flat.

[50] The fact that the unknown male's death was caused by the assault inflicted on him by the three accused persons and Izlan or any one or more of them is also borne out by SP-8's evidence. She concludes there that the cause of death was coronary occlusion caused by atheroma aggravated by multiple blunt trauma. As explained above, the unknown man was suffering from a pre-existing coronary condition which was aggravated by the multiple blunt trauma inflicted on him by the three accused persons and Izlan. This resulted in his death. The multiple blunt trauma, according to SP-8, was in all probability caused by acts such as punching, hitting, kicking and beating the deceased man with blunt objects including a hammer. A hammer was taken into the room. When the evidence of SP-12 and SP-8 are considered in totality the clear and legitimate inference that arises is that the unknown man died as a consequence of the act of the three accused persons and Izlan or any one or more of them.

SECTION 34 OF THE PENAL CODE

[51] The defence contended that as there was no eyewitness account as to exactly what had transpired in the room it could not legitimately be inferred

A that the three accused persons were involved in, or participated in, the assault on the unknown man. If however, that proposition is correct then it would follow that no conviction for the commission of a crime could be procured unless there exist eyewitnesses who are able to give an account of the commission of such acts. On the contrary, the correct proposition of law as
B expounded earlier is that if there is sufficient circumstantial evidence leading inexorably to the conclusion that the accused person is he who committed the offence, then that is sufficient in law to establish liability for the commission of such offence. In this case, the cumulative effect of the evidence of SP-12, SP-8, SP-11 as well as the numerous exhibits taken from the scene of the
C incident point clearly to the fact that the death of Rahanuddin Late Abdus Samad was a consequence of the blows inflicted on him when the three accused persons and Izlan were with him in the store-room in the early hours of the morning of 14 July 2002.

D **[52]** At this juncture it is also pertinent to bear in mind that the charge against the three accused persons is to be read together with s 34 of the Penal Code, as set out in element (iii) above. Section 34 provides as follows:

> Where a criminal act is done by several persons in furtherance of the common
E intention of all, each of such persons, is liable for that act in the same manner as if it were done by him alone.

[53] The principle encompassed by s 34 is that where two or more persons intentionally do an act jointly then each of them is liable for that act as if he
F had done the act individually. It confers vicarious liability for criminal acts. The characteristic feature of the section is the element of participation in the act. It requires prior concert between the participants or a pre arranged plan. In *Gurdatta Mai* AIR 1965 SC 257, the Supreme Court observed:

G > The necessary conditions for the application of s 34 of the Code are common intention to commit an offence and participation by all the accused in doing act or acts in furtherance of that common intention. If these two ingredients are established all the accused would be liable for the said offence.

H **[54]** The fact that the three accused persons participated in the act causing the death of the unknown man may be legitimately inferred from the following facts/evidence:

(a) All the three accused persons went in together with Izlan and were
I armed with, inter alia, a hammer and a belt;

(b) The door was kept locked throughout the episode; if any one or more of the accused persons had not wanted to participate) in the violence, (even by standing by and watching) he or they could have left the room, and/or allowed the victim to escape;

(c) None of the accused persons came out of the room until the accused man had ceased to shout and scream;

(d) There was no attempt by any of the accused persons to immediately call for medical aid for the accused after they all left the storeroom;

(e) Their joint announcement to Izlan that 'Raihan is dead' clearly referred to the unknown man in the storeroom. It further shows that they did not at any time seek to resuscitate or save the unknown man;

(f) The act of packing the body into a box and leaving it in a distant place also shows their intention to conceal their criminal act.

[55] Their joint inaction in the face of his having been grievously bodily injured together with their joint presence in the room merits the valid inference that all three accused persons and Izlan by their joint act, caused the death of the unknown man. In the Indian case of *Gurnam Singh v State of Punjab* 1988 Cri LJ 4024, the appellant had been convicted with other persons of having kidnapped three victims and then committing their murder. The prosecution case was that the appellant together with seven other accused had formed an unlawful assembly the common object of which was to abduct the three victims and murder them. No direct evidence was led to prove the murders of the victims by the appellant and the others. The prosecution however, led evidence to prove that the eight accused, including the two appellants had abducted those five persons and had failed to explain what had happened to them thereafter. Even though there was no direct evidence to show how those three persons were murdered, the court relying upon the medical evidence which proved that the deaths had taken place shortly after their abduction and also upon failure of the appellants to explain what they did with the abducted persons, held them guilty for the offence of murder also. In upholding the decision of the trial court the Supreme Court in India concluded that the evidence of several eye-witnesses established the fact of kidnapping. While the victims were kidnapped the accused were armed with deadly weapons. The medical evidence established that the three victims had died within a short time after they were kidnapped. As such the court held:

> ... *that leads to a legitimate inference that the persons who had kidnapped had killed them. The prosecution case was that Gurnam Singh and Palwinder Singh along with six other accused had committed the offences. There is no evidence to show that any of the appellants had himself killed any of the deceased.* Therefore the Designated Court instead of convicting under s 302 should have convicted them for the offence punishable under s 302 read with s 34 IPC...
> (Emphasis added.)

[56] In the instant case the three accused and Izlan are charged with murder under s 302 of the Penal Code read together with s 34.

[57] The effect of s 34 is that proof is not required that any particular accused was responsible for the commission of the actual offence. The question that arises for consideration is whether it was the common intention of the three accused persons and Izlan to cause the death of the unknown male on 14 July 2002. This is a question of fact. The salient features of 'common intention' are physical presence and participation in the commission of the offence. In *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528, the Court of Appeal reiterated the position in law set forth in *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 thus (at pp 50–51):

> To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, Sethi J speaking for himself and Agrawal J said:
>
> > Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition of the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention presupposes prior concert which requires a pre-arranged plan of the accused participating in such an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial testis that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.
>
> In *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:
>
> > Under the provisions of s 34, the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of the principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. *As was observed in Ch Pulla Reddy & Ors v State of Andhra Pradesh* AIR 1993 SC 1899, *s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34, it is not necessary to show some overt act on the part of the accused.*
>
> (Emphasis added.)

[58] In order to ascertain whether a common intention to cause the death of the unknown man has been made out, it is necessary to consider again the primary events of the evening of 13 and 14 July 2002. SP-12's evidence establishes that the three accused persons and Izlan had arranged to meet and spend the night at Izlan's flat. This is borne out by the fact that Izlan picked up the three men and left them in his flat, as well as the fact that they were all asleep there when SP-12 and Izlan arrived back in the early morning hours of 14 July 2002.

[59] SP-12's evidence also establishes that the three accused persons and Izlan acted in accord or jointly in that:

(i) they all went into the storeroom where the unknown male had been shut in;

(ii) they took in with them a hammer and Izlan's belt;

(iii) injury was inflicted on the male by one or more of them as evidenced by the loud cries of 'Sakit! Sakit!' emanating from the store which was heard by SP-12;

(iv) they came out together when the unknown male had ceased to make any further sounds;

(v) they announced that 'Raihan is dead';

(vi) two or three of the four persons placed the box containing the body along Jalan Bukit Permai 2/3.

[60] On the basis of this same series of facts, it can be inferred that there existed a pre-conceived plan or arrangement between Izlan and the three accused persons to hold the unknown male against his will, and to cause him bodily injury. It is true that SP-12 did not see who inflicted the injuries on the victim; no one did. But it does not follow that simply because there was no eyewitness as to the precise manner in which the fatal injuries were inflicted on the victim in the storeroom of Izlan's flat, none of the accused who was present can possibly be held liable. As there existed a common intention between the three accused persons and Izlan, it mattered not whether only one of them or all of them took turns to injure the unfortunate Raihan. The fact that they were all present during the infliction of the blows and did not try to stop such an attack nor to report such an attack all point to a common intention to cause injury. As such each one of them is equally liable as if he had inflicted blows on the victim.

What was the nature of the common intention of the three accused persons and Izlan?

[61] This issue is best answered by considering the medical evidence

relating to the injuries to the accused. Although there were 14 marks of injury they comprised entirely of contusions save for the fractures to the eighth and ninth ribs. A fracture of the eighth and ninth ribs is generally insufficient to cause death. There was no injury caused to the vital organs.

[62] The doctor opined that the nature of the injuries, ie multiple blunt trauma, would not in itself be sufficient to cause death in an ordinary healthy man. In other words none of the injuries was sufficient to cause death in the ordinary course of nature. Here the unknown victim had a pre-existing condition whereby 90% of his coronary vessels were occluded. From the medical report it would appear that the infliction of the injuries, albeit not to any of the vital organs, was sufficient to aggravate his pre-existing condition so as to cause death.

[63] There was no evidence adduced by the prosecution to the effect that the accused persons or Izlan were aware of the victim's pre-existing heart condition. In the absence of proof by the prosecution that the injuries caused were sufficient in the ordinary course of nature to cause death, or that the accused persons were aware that such injury as was inflicted would cause the victim's death, it is difficult to conclude that the common intention of the four men was to cause the death of the victim. This is further borne out by the weapons utilised. The evidence disclosed that a hammer and a belt were taken into the room by the four men. The medical evidence was that the multiple blunt trauma suffered could have arisen as a consequence of kicks, punches and blows from a blunt object like an umbrella or hammer. No lethal weapons were utilised. Neither was the injury inflicted on vital organs. The totality of the evidence put forward by the prosecution establishes instead a common intention to bodily injury, not murder.

[64] In the case of *Putti Lai v State* 1969 Cri LJ 531 the facts showed that the deceased victim was an old man with an enlarged and flabby heart. He was lifted by the accused during a quarrel and thrown on the ground from some distance but with sufficient force that his ribs were fractured. He died as a consequence of a rupture of his heart. The accused was charged under s 304, Part II of the Indian Penal Code, which is similar to the second limb of s 304 of the Penal Code. The Allahabad High Court on appeal, adjudicated that the prosecution had failed to establish a case under s 304 of the Code, but instead found that the accused was guilty of causing grievous bodily hurt. In arriving at such a conclusion the reasoning of the court was as follows:

> … As regards the second submission it has some force. The doctor who conducted the post-mortem examination, in his evidence clearly said that the heart of the deceased was enlarged and flabby. The death had resulted due to rupture of the heart. The injuries found on the person of the deceased could be caused by a single

fall. He further stated that the rupture of the heart of the deceased on account of his old age, was possible even by an ordinary injury. He added that this, however, could not have occurred in the case of a normal healthy man. It was also clear from the medical evidence that the ribs of Asharfi had been broken. There was nothing on the record to show that the appellant had any knowledge that the deceased had a badly enlarged heart, on account of which he died.

On behalf of the appellant, reliance has been placed on the case reported in (1880) ILR 2 All 766, *Empress of India v O'Brien*. Their Lordships observed:

> There is no reason to doubt that the act was not done with the intention of causing death, or of causing such bodily injury as the accused knew was likely to cause the death of the old man, nor was the act done with the intention of causing bodily injury to the man, nor was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death, nor did the accused, when striking the man, know that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The offence therefore of culpable homicide can not be committed. But I think that there can be no doubt that the accused committed the offence of voluntarily causing grievous hurt. He struck the deceased on the ribs with a stick and inflicted a hurt which not only endangered his life but actually caused his death and which he must have known was likely to break a rib if it did no worse injury...

Similar view was expressed in another case reported in (1881) 1LR3 All 776, *Empress of India v Idu Beg*. In the instant case, it was clear that the appellant had no intention or knowledge to cause the death of Asharfi. But he caught him by the neck, bodily lifted and threw him on the ground. He was an old man and his ribs were fractured. It could not be doubted that he was thrown from some distance and with sufficient force. So it could be reasonably presumed that the appellant possessed the requisite knowledge that by his act, grievous hurt could be caused to the victim. He is only guilty of the charge under s 325 of the Indian Penal Code. His conviction under s 304, Part II IPC is clearly erroneous, and must be set aside

[65] Such reasoning is applicable in this case too. As set out above it is clear that the three accused persons, on the record of evidence before this court, had no intention or knowledge to cause the death of the unknown man, later identified as Mohd Rahanuddin Late Abdus Samad. However it is equally clear from their conduct both prior to and after the death of the unknown male that they possessed the knowledge and intended, by their joint act to cause the victim grievous bodily hurt. Accordingly at the close of the prosecution case, the court finds that while a case under s 302 of the Penal Code has not been established, there is sufficient evidence to establish a prima facie case under s 325 of the Penal Code read together with s 34 of the Penal Code. Accordingly the three accused persons were called upon to enter their defence to the following charge:

That you together with a person who has died (Mohd Izlan bin Johari No. KP: 781228-14-6183) on 13 July 2002 between the hours of approximately 10pm until 5am on 14 July 2002 in house No. AK 3-19, Jalan Pandan Indah 3/3, Pandan Indah, Ampang in the district of Hulu Lang at, in the state of Selangor Darul Ehsan did commit the offence of causing grievous bodily harm by inflicting blunt trauma injury on Mohd Rahanuddin Late Abdus Samad who was a citizen of Bangladesh as a consequence of which he died and you have thereby committed an offence that is punishable under s 325 of the Penal Code read together with s 34 of the Penal Code.

[66] On 1 July 2008 the reduced charge above was read out and translated to the three accused persons. I was satisfied that they comprehended the nature of the charge and the statutory ambit of the punishment that could be imposed under s 325 of the Penal Code. The three accused persons each pleaded guilty, fully comprehending the consequences of their plea. They were then convicted and their pleas in mitigation heard. After due consideration of the entirety of facts of the case, and bearing in mind the principles of sentencing, namely the element of public interest as well as their pleas in mitigation, the three accused persons were sentenced to six and a half years imprisonment to commence from the date of their arrest.

Accused persons sentenced to six and half years imprisonment.

Reported by Ashgar Ali Ali Mohamed